86 No. 1626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JANIE L. HASKINS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals err in applying the "but for" or "same decision" causation test in denying petitioner any relief pursuant to section 706(g) of Title VII of the Civil Rights Act of 1964 even though she proved that she was an actual victim of unlawful discrimination under the pretext theory established in McDonnell Douglas v. Green, 411 U. S. 793 (1973)?

2. In light of the Title VII remedial theory this Court enunciated in Albemarle Paper Co. v. Moody, 422 U. S. 405 (1975), is a defendant who admits that it unlawfully discriminated against an individual in violation of Title VII of the Civil Rights Act of 1964 entitled to rely on the "but for" or "same decision" theory of causation to defeat an actual victim's entitlement to rightful

place and make-whole relief.?

3. Whether the administrative scheme governing federal employee employment discrimination claims brought under Title VII of the Civil Rights Act of 1964 contemplates that agency and EEOC rulings in favor of employees are binding on district courts without further causal analysis when the victim of the agency's discriminatory conduct does not seek de novo reveiw in the district court?

PARTIES

The parties to this proceeding are Janie L. Haskins and the Department of Army of the United States.

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Petitioner Janie L. Haskins respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 8, 1987.

OPINIONS BELOW

The opinion of the court of appeals is reported at 808 F. 2d 1192 (6th Cir. 1986), and is set out at pp. 1a-17a of the Appendix. The district court's December 10, 1985 memorandum opinion and order denying petitioner's motion to alter or

amend, which are not reported, are set out at pp. 18a-25a of the Appendix. The district court's October 28, 1985 memorandum opinion and order on relief, which are not reported, are set out at pp. 26a-51a of the Appendix. The district court's February 3, 1984 order on liability, which is not reported, is set out at pp. 52a-53a of the Appendix. The July 29, 1981 decision of the Army accepting the findings and recommendation of the EEOC complaint examiner is set out in the Appendix at 54a-83a.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1987. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a)(1), provides:

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000e-5(g), provides, in part:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and

order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, or suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . .

Section 717(d) of Title VII of the Civil Rights Act of 1964, relating to employment discrimination claims brought against federal employers, provides:

> (d) The provisions of sections 706(f) through (k), as applicable, shall govern civil actions brought [against federal employers].

Equal Employment Opportunity Commission's Regulations on Employment Discrimination in the Federal Government, 29 C. F. R. §§ 1613 et seq. (1986). These regulations implement section 717 of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-16, and provide for administrative hearings on employment discrimination claims brought by federal employees.

STATEMENT OF THE CASE

Petitioner, a female, is a civilian employee with the United States Army at its Fort Campbell, Kentucky post (Fort Campbell). In September 1979, the Army

announced a vacancy in a GS-11 position at Fort Campbell. Petitioner applied for the position but the Army awarded the vacancy to a male, Mr. Beisel. The petitioner sought relief under section 717 of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-16.

Petitioner filed an administrative charge under 29 C. F. R. §§ 1613 et seq. claiming that she had been denied the GS-11 vacancy because of her sex in violation of Title VII.[1] An EEOC complaint examiner

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[1] The Equal Employment Opportunity Commission has adopted detailed regulations governing the administrative processing of federal employee employment discrimination claims. 29 C. R. F. § 1613 et seq. (1986). The regulations were initially promulgated by the Civil Service Commission (CSC) pursuant to section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. The EEOC adopted essentially all of the CSC's regulations when, pursuant to the Reorganization Plan No. 1 of 1978, jurisdiction over complaints of discrimination by federal employees was transferred from the CSC to the EEOC. 43 Fed. Reg. 60900 (1978).

conducted an evidentiary hearing on petitioner's charge pursuant to 29 C. F. R. § 1613.218.[2] The EEOC complaint examiner evaluated the evidence under the pretext theory of discrimination established in McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973). The EEOC complaint examiner found the Army's selection process had been "tainted with manipulations to insure" Mr. Beisel's inclusion in the pool of applicants and to assure his ultimate selection as the suc-

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[2] 3a-4a. The EEOC regulations on enforcement of Title VII claims brought by federal employees provide the complainant a right to request a full evidentiary hearing. 29 C. F. R. § 1613.217(b). The complaint examiner who conducts the hearing must be an employee of another agency, and be certified by the EEOC as qualified to conduct a hearing. Id. § 1613.218(a). Testimony is given under oath or affirmation, and both the complainant and the representative of the federal agency have the right to cross-examine. Id. § 1613.218(c)(2). The hearing is recorded and transcribed. Id. § 1613.218(f).

cessful candidate.[3] The EEOC complaint examiner further found petitioner was as qualified for the vacancy as Mr. Beisel (and other applicants) because her "experience, training and awards [were] directly related to the position in question" and Mr. Biesel's was not;[4] the rating panel had given Mr. Biesel credit for his status as a honor graduate but had not given petitioner credit for a similar honor;[5] and another male applicant had been rated best qualified even though he had received a less than outstanding rating in the category of supervision but petitioner had been rated only highly qualified even though she had an outstanding rating in the category of supervi-

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[3] 69a, 73a-44a.

[4] 67a-68a, 77a-78a.

[5] 68a.

sion.[6] Even though the rating panel had rated two other female applicants as best qualified[7], the EEOC complaint examiner concluded that a preponderance of the evidence supported a finding that the Army had preselected Mr. Beisel only after receiving assurance from these females that they would not "rock the boat" if Mr. Biesel was selected. (72a-73a).

With respect to the ultimate fact of discrimination vel non, the complaint examiner rejected as pretextual the Army's claim that Mr. Beisel was more qualified for the vacancy than petitioner because the selection and rating process

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[6] 68a.

[7] An applicant had to receive a rating of best qualified under the Army's Merit Placement and Promotion Plan to be included among the candidates from which a successful candidate was selected. See 61a-62a.

"reflect[ed] arbitrary and capricious decisions" and "numerous procedural errors and deficiences" in both the process of recruitment and referral of applicants. (77a). The EEOC complaint examiner ruled that petitioner had proven by the preponderance of the evidence that she was an actual victim of discrimination prohibited under Title VII. (73a-75a).

After finding petitioner to be an actual victim of sex discrimination under the McDonnell Douglas' pretext analysis, the EEOC complaint examiner applied the rule announced in Day v. Mathews, 530 F. 2d 1083 (D. C. Cir. 1976), rather than the remedial theory established in Albemarle Paper Co. v. Moody, 422 U. S. 405 (1975), to determine whether petitioner was entitled to make-whole or rightful place relief. (3a, 78a-79a). Day v. Mathews construed section 706(g) of Title VII, 42 U. S. C. § 2000e-5(g), as embracing "but

for" causation to determine whether a discriminatee is entitled to relief. Under Day v. Mathews a district court must deny a proven victim of discrimination rightful place and make-whole relief if defendant proves by clear and convincing evidence that the victim would not have been selected even absent discrimination. The EEOC complaint examiner, finding that the Army had satisfied the Day v. Mathews rule, rejected petitioner's prayer for a retroactive promotion and back pay.[8] The Army and the EEOC adopted the complaint examiner's finding of discrimination but modified the recommendation on relief.[9]

Having exhausted her administrative remedy, petitioner sought relief in the

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[8]The administrative decision limited petitioner's relief to an award of priority promotion and attorney's fees. 79a-80a.

[9] 4a, 78a-79a.

district court. Petitioner initially requested de novo review. She abandoned her request for de novo review after the Army admitted liability:

> The jurisdictional basis of this lawsuit is 42 U. S. C. § 2000e-16. Thus, the issue should be whether [petitioner] was the victim of discrimination based on her sex. This issue, however, was determined in her favor by the Army and upheld on appeal by the EEOC. We do not challenge that determination. There remains only the issue of relief to which she is entitled.

Joint Appendix in the Sixth Circuit, at A-40. The Army, though admitting liability, argued that petitioner was not entitled to relief under the Day causation test. Based on the Army's admission, petitioner filed a motion for partial summary judgment on liability. The district court granted petitioner's motion but specifically noted the disagreement between the

parties on the appropriate standard for determining relief. (52a-53a).

The trial was limited to the issue of relief to which petitioner was entitled under section 706(g) of Title VII, 42 U. S. C. § 2000e-5(g). The evidence the parties presented at trial was essentially the same evidence presented in the administrative hearing. (See 26a-50a and 54a-78a). In its memorandum decision and order the district court ruled that petitioner was entitled no relief because the Army had satisfied the Day v. Mathews "but for" rule.[10] In denying petitioner relief, the district court notably ignored the minimal relief she had obtained in the administrative hearing.

Petitioner moved the district court to alter or amend its judgment on relief on two grounds. First, she relied upon a

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[10] 40a ~~42a~~-43a, 50a.

recent Sixth Circuit decision, Blalock v. Metals Trades, Inc., 775 F. 2d 703 (6th Cir. 1985), which held that causation is generally an element to be decided in the liability phase of an individual Title VII case. Second, she relied on a more recent decision of the District of Columbia Circuit Court of Appeals, Toney v. Block, 705 F. 2d 1364 (D. C. Cir. 1983), which had limited its Day v. Mathews rule to the relief phase in class action cases. The district court denied the motion. (18a-25a). The district court also rejected petitioner's renewed prayer for injunctive and declaratory relief on the ground that to grant the relief would "be an act of discrimination in favor of [petitioner]" and allow her to "receive a benefit not afforded to other potential, innocent applicants for the position." (22a). Petitioner left the district court empty-handed even though the Army admitted that

she was an actual victim of its discrimination.

The Sixth Circuit affirmed the decision of the district court in all respects. (1a-17a). The court of appeals did not disturb the district court's liability ruling in favor of petitioner. (See 14a). The court of appeals specifically noted the conflict in the circuits on the application of causal analysis in the liability and relief phases in individual Title VII cases (10a-11a), but agreed with petitioner's argument that normally, under its decision in Blalock v. Metals Trades, Inc., 775 F. 2d 703 (6th Cir. 1985), causation is an element that is to be decided in determining liability in the liability phase and cannot be reopened in the remedial stage. (11a-12a). The Sixth Circuit, however, refused to apply Blalock v. Metals Trades in this case on the ground that the EEOC complaint

examiner's had failed to properly analyze the evidence under the appropriate causation theory. (12a and n. 3). The parties litigated this case under the pretext theory of discrimination in the administrative hearing and the Sixth Circuit apparently accepted the pretext theory as proper to determine liability. The Sixth Circuit, however, analyzed the relief issue under the "same decision" causation theory established in Mt. Healthy City School District Board of Education v. Doyle, 429 U. S. 274 (1977), and under the Day v. Mathews rule since it held that the Army's argument based on "same decision" was not raised until the issue of relief arose. (10a, 11a and n. 2, 12a). The court then held that the district court was justified in deciding the causation in the relief phase since the "same decision" defense was not raised in the liability phase. (13a). The court of appeals also

relied heavily upon Day v. Mathews in affirming the district court. (11a and n. 2, 15a and n. 5). Finally, the court of appeals rejected petitioner's argument that the Army's admission of liability included an admission on the causation element.[11] (9a, 15a). In rejecting petitioner's argument, the Sixth Circuit, like the district court, completely ignored the EEOC complaint examiner's findings that the Army's defense was pretextual since petitioner was as well qualified as Mr. Beisel and the Army had knowingly used a "tainted," "arbitrary and capricious" selection process to assure Mr. Beisel's selection.

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[11]The court of appeals apparently overlooked the fact that petitioner had abandoned her request for de novo review when she sought summary judgment on the liability issue since it erroneously stated that petitioner specifically requested de novo review on the issue of relief. (15a).

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are several. First, a conflict exists among the courts of appeals on the proper application of causal analysis in the liability and relief phases in individual cases brought under Title VII. Second, the Sixth Circuit's reliance on the "but for" rule of Day v. Mathews, 530 F. 2d 1083 (D. C. Cir. 1976), in determining whether relief should be awarded to actual victims of discrimination conflicts with the remedial theory enunciated in Albemarle Paper Co. v. Moody, 422 U. S. 405 (1975). Third, the conflict in the lower courts on causal analysis in individual cases is grounded substantially in efforts of the lower courts to flesh out the relationship, if any, between the "but for" and "same decision" causation tests. Fourth, judicial expressions of un-

certainty on the proper application of causal analysis in individual Title cases are increasing.[12]

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[12] In Albemarle Paper Co. v. Moody, 422 U. S. 405, 445 (1975), then-Justice Rehnquist noted that his canvass of lower court decisions showed that the most recurring problem in federal statutory law on employment discrimination was the "difficulty of ascertaining a sufficient causal connection between an employer's conduct properly found to have been [unlawful] and [the] amount of backpay lost by particular claimants as a result of that conduct." Other courts have expressed similar uncertainty on the role of causation generally in individual cases. See, e.g., Goostree v. Tennessee, 796 F. 2d 854, 863 (6th Cir. 1986), cert. denied, No. 86-1165 (U. S. March 9, 1987), 55 U. S. L. W. 3607("[c]ausation in the Title VII context is an elusive concept"); Toney v. Block, 705 F. 2d 1364, 1372 (D. C. Cir. 1983)(Tamm, J., concurring)(it is currently uncertain what degree of causal nexus between the consideration of an impermissible criterion and the alleged injury must be shown in order to prove unlawful employment discrimination); American Federation of Government Employees v. FLRA, 716 F. 2d 47, 51 n. 2 (D. C. Cir. 1983)(same); Shanley v. Youngstown Sheet & Tube Co., 552 F. Supp. 4, 7 (N. D. Ind. 1982)(Posner, J., sitting by designation)(less certainty than one would expect on causation in employment discrimination law)).

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICATION OF CAUSAL THEORY IN INDIVIDUAL EMPLOYMENT DISCRIMINATION CASES

Courts often bifurcate Title VII employment discrimination litigation into the liability and relief phases in both individual and class action cases. Although the courts of appeals agree on causal theory as applied in the relief phase in class action cases,[13] they are in conflict on the proper application of

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[13]The proper application of causal analysis in class action litigation is not at issue here. The lower courts agree that this Court's decisions in cases such as Franks v. Bowman Transportation Co., 424 U. S. 747 (1976), and Teamsters v. United States, 431 U. S. 324 (1977), provide guidance on causal analysis in the relief phase in class action cases. See, e. g., Dillon v. Coles, 746 F. 2d 999, 1004-1005 (3d Cir. 1984); McKenzie v. Sawyer, 684 F. 2d 62, 75-78 (D. C. Cir. 1982).

causal analysis in both the liability and relief phases in individual cases.

This Court has distinguished between pretext and mixed-motive cases.[14] Some courts of appeals hold that causal analysis is significant only in the liability phase in individual Title VII pretext cases; once liability is established then only the principles announced by this Court in Albemarle Paper Co. v. Moody, 422 U. S. 405 (1975), are to be applied to determine appropriate relief under Section 706(g) of Title VII, 42 U. S. C § 2000e-5(g). Dillon v. Coles, 746 F. 2d 999 (3d Cir. 1984); Toney v. Block, 705 F. 2d 1364

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[14] See NLRB v. Transportation Management Corp., 462 U. S. 393, 400 & n. 5 (1983). The ultimate factual inquiry in a pretext or single motive case is ascertaining the "true motive" for the adverse employment decision. In a mixed-motive case, the challenged employment decision presumably motivated by both pretextual (unlawful) and nonpretextual (lawful) reasons. See Blalock Metals Trades, Inc., 775 F. 2d 703, 709 & n. 8 (6th Cir. 1985).

place heavy reliance on Day v. Mathews, 530 F. 2d 1083 (D. C. Cir. 1976), rather than this Court's decision in Albemarle Paper Co. v. Moody, 422 F. 2d 405 (1975)(Moody). Moody established a strong policy-based rule that actual victims of discrimination are presumptively entitled to effective make-whole and rightful place relief. Relief to actual victims of discrimination under the Moody standard is to be denied only if it would not frustrate the central purposes of Title VII. 422 U. S. at 421.

Day v. Mathews is fundamentally inconsistent with Moody when applied in the relief phase in pretext cases because, as is demonstrated in this case, it allows defendants to defeat awards of effective make-whole and rightful place relief to individuals who have proven themselves to be actual victims of unlawful discrimination. Day v. Mathews also frustrates the

central purposes of Title VII because it gives defendants two bites at the "causation apple" since lower courts, including the Sixth Circuit,[19] have construed footnote 10 in McDonald v. Santa Fe Trail Transportation Co., 427 U. S. 273, 282 n. 10 (1976), as adopting the "but for" test of causation to establish liability in pretext cases. As Judge Lay correctly observed in his concurring opinion in Bibbs v. Block, 778 F. 2d 1318, 1326-27 (8th Cir. 1985)(en banc), the practical effect of applying causation in the relief phase in individual cases is to require actual victims to prove discriminatory motivation was the sole cause for the employer's adverse decision even though Congress and the courts have rejected the sole cause

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[19] Blalock v. Metals Trades, Inc., 775 F. 2d 703, 709 (6th Cir. 1985)(collecting cases).

test.[20] Moreover, counsel for petitioner have been unable to find any other legal claims, including tort claims, which allow a party two opportunites on separate ocassions to prove or disprove the same element of the claim. See Shanley v. Youngstown Sheet & Tube Co., 552 F. Supp. 4, 7 (N. D. Ind. 1982)(Posner, J., sitting by designation)(relying on tort law to reject a two-tiered application of causation in a Title VII case).

The application of the Day v. Mathews in this case is particularly egregious for several reasons. First, the Army admitted[21] that it discriminated against

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[20]H. R. 7152, 88th Cong. 2d Sess., 110 Cong. Rec. 13, 834- 838 (1964)(remarks of Senators Case and Magnuson); Geller v. Markam, 635 F. 2d 1027, 1035 (2d Cir. 1980); Blalock v. Metals Trades, Inc., 775 F. 2d 703, 709 (6th Cir. 1985).

[21]Admissions made in memoranda accompanying motions for summary judgments are treated as judicial admissions. See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F. 2d 1217, 1261, 1271 (9th Cir. 1982).

petitioner because of her sex. Judicial admissions are proof possessing the highest possible probative value because admitted facts not only eliminate the need for evidence on those facts but they are beyond the power of the parties to introduce evidence to controvert them.[22] Second, the application of Day v. Mathews, for all practical purposes, provided the Army de novo review on the liability issue even though it was not entitled to it under the admininstrative regulations.[23] Third, as the Sixth Circuit observed in an analogous Title VII case, it is impossible

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[2 2] See Best Canvas Prod. & Supplies v. Ploof Truck Lines Inc., 713 F. 2d 618, 621 (11th Cir. 1983); Ferguson v. Neighborhood Housing Services, 780 F. 2d 549, 550-51 (6th Cir. 1986).

[23] Moore v. Devine, 789 F. 2d 1559 (11th Cir. 1986); Houston v. Nimmo, 670 F. 2d 1375 (9th Cir. 1982). See also III, infra.

to read a record like this one without concluding that the process the Army used to deny petitioner the GS-11 position was a "cruel farce."[24] Fourth, courts have repeatedly rejected as unworthy of credence[25] proffered explanations of a legitimate nondiscriminatory defense when, as here, the successful candidate has been preselected.[26]

The Sixth Circuit, in this case, while noting the conflict among the circuits on the proper application of causal analysis in the liability and relief

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[24] Abrams v. Johnson, 534 F. 2d 1226, 1231 (6th Cir. 1976).

[25] See Texas Department of Community Affairs v. Burdine, 450 U. S. 248, 256 (1981)(plaintiff can establish liability by showing defendant's asserted legitimate nondiscriminatory reason is not worthy of credence).

[26] Coble v. Hot Springs School Dist. No. 6, 682 F. 2d 721, 729 (8th Cir. 1982); Lewis v. Smith, 731 F. 2d 1535, 1539 n. 4 (11th Cir. 1984)(rejected best qualified defense when selection process was a sham).

phases in individual employment discrimination cases[27], joined those circuits (Third and District of Columbia[28]) which hold that causal analysis is properly a function of determining liability and that once decided in favor of an actual victim cannot be relitigated in the relief phase. The causal issue was decided in favor of petitioner in the administrative process since the parties litigated the claim under the McDonnell Douglas pretext theory. (3a, 78a). The EEOC complaint examiner found pretext and the Army accepted that finding when it admitted liability in the district court. The Sixth Circuit held also that if the causal element is not decided in the liability phase, a court must decide the issue in the relief phase even though a court has found in favor of the

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[27] 10a-11a.

[28] See supra p. 21.

discriminatee in the liability phase. (12a-13a). On this latter point, the Sixth Circuit joined those circuits which hold that causal analysis is proper in both the liability and relief phases in individual employment discrimination cases[29].

The courts of appeals are in conflict also over the standard of proof to be applied in the relief phase in employment discrimination cases.[30] Some courts hold that an award of relief to actual victims of employment discrimination can be overcome only if defendant rebuts the presumption by clear and convincing evidence.[31]

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[29] See cases cited supra p. 22.

[30] See Cohen v. West Haven Board of Police Comm'rs, 638 F. 2d 496, 502 n. 10 (3d Cir. 1980)(noting conflict).

[31] The Fifth, Seventh, Ninth, and District of Columbia Circuits have adopted the clear and convincing standard. E. g., McCormick v. Attala County Board of Education, 541 F. 2d 1094, 1095 (5th Cir. 1976); Steward v. General Motors Corp., 542 F. 2d 445, 453 (7th Cir. 1976), cert.

Other courts have adopted the preponderance of the evidence standard.[32] Even if the more stringent clear and convincing standard is correct, the Army has not met it in this case. The Army knowingly used a "tainted," "arbitrary and capricious" process to deny petitioner the vacancy. The Army's conduct in this respect is clear evidence of "bad faith" under Moody so the Army can " make no claim whatsoever to the Chancellor's conscience." 422 U.

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denied, 433 U. S. 919 (1977); Marotta v.Usery, 629 F. 2d 615, 618 (9th Cir. 1980); Toney v. Block, 705 F. 2d 1364, (D. C. Cir, 1983).

[32] Bibbs v. Block, 778 F. 2d 1318, 1324 & n. 5 (8th Cir. 1985).

The standard is unclear in the Fourth Circuit. One panel, in Patterson v. Greenwood School Dist., 696 F. 2d 293, 295 (4th Cir. 1982), adopted the clear and convincing standard. Another panel, in Smallwood v. United Air Lines, Inc., 728 F. 2d 614, 619 (4th Cir.), cert. denied, 105 S. Ct. 120 (1984), without citing Patterson, adopted the preponderance of evidence standard.

S. at 422.

This case squarely presents a conflict among the courts of appeals on an obviously recurring and unresolved issue concerning causal analysis in employment discriminaton law that should be resolved by this Court.

II.
THIS CASE RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE CONCERNING THE ROLE OF CAUSATION IN CASES BROUGHT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

In view of the conflict identified in I, supra, clear guidance from this Court on the role of causation in the liability and relief phases in individual employment discrimination cases is necessary for several reasons. First, much of the conflict in the lower courts on causal analysis in individual employment discrimination cases is grounded in several decisions of this Court. First, in footnote 10 in McDonald v. Santa Fe Trail Transportation Co., 427 U. S. 273, 282 n. 10

(1976), the Court held that "pretext" means no more than plaintiff must show that an illegal criteria was a "but for" cause. The meaning of the Court's equation of "pretext" and "but for" causation has generated confusion and uncertainty in the lower courts.[33]

Second, uncertainty exists among the circuits as to the relevancy in Title VII cases of the "same decision" test this Court enunciated in Mt. Healthy City Board

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[33] See supra note ~~28~~ 12. See also Lewis v. Univ. of Pittsburg, 725 F. 2d 910 (3d Cir. 1984), cert. denied, 106 U. S. 266 (1984)(disagreement among the panel on the meaning of note 10 in McDonald v. Santa Fe).

Justices Brennan and Powell would have granted certiorari in Lewis.

The United States recognizes the issues raised in this petition are of exceptional importance. See Bibbs v. Block, 778 F. 2d 1318 1330 (8th Cir. 1985)(en banc)(Ross, J., dissenting)(noting the United States grounded its petition for rehearing on causation as raising issues of exceptional importance).

of Education v. Doyle, 427 U. S. 274 (1977).[34] Mt. Healthy was a first amendment constitutional case raising a mixed-motive causation issue. Although this Court has briefly cited Mt. Healthy in several of its Title VII class action cases,[35] it has never squarely dealt with the issue of whether the "same decision" test is applicable in federal statutory employment discrimination cases. The Eleventh Circuit holds that the "same decision" test is to applied as a separate, additional step in the McDonnell Douglas pretext analysis to determine liability. Perry v. Johnson Products Co., 698 F. 2d 1138, 1142-1143 (11th Cir. 1983). The Eighth Circuit holds that the "same deci-

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[34] See, e. g., Bibbs v. Block, 778 F. 2d 1318 (8th Cir. 1985)(en banc).

[35] E. g., Teamsters v. United States, 431 U. S. 324, 368 (1977); East Texas Motor Freight v. Rodriquez, 431 U. S. 395, 403 n. 9 (1977).

sion" test is to be applied differently in the Title VII and constitutional cases: in Title VII cases, the test is applied in both the liability and relief stages Bibbs v. Block, 778 F. 2d 1318 (8th Cir. 1985)(en banc), but in the constitutional cases it is applied only to determine liability, Hervey v. City of Little Rock, 787 F. 2d 1223, 1333 & n. 7 (8th Cir. 1986). The Sixth Circuit has held that it can discern no meaningful difference between the "but for" and "same decision" test. Blalock v. Metals Trades, Inc., 775 F. 2d 703, 712 (6th Cir. 1985). This Court has also equated the two tests. Givhan v. Western Line Consolidated School Dist., 439 U. S. 410, 417 (1979).

Third, the courts that apply causal analysis in the relief stage in individual cases under either the "but for" or "same decision" test have failed to recognize the critical distinction between individu-

al and class action employment discrimination cases this Court identified in Cooper v. Federal Reserve Bank of Richmond, 467 U. S. 867 (1985). The crucial difference, as identified in Cooper, is that in the individual cases the "inquiry regarding an individual's claim is the reason for a particular employment decision" whereas in the class action cases the focus "at the liability stage. . . will not be on individual hiring decisions." 467 U. S. at 876 (emphasis supplied). The Cooper distinction is critical to a determination of a proper application of causal analysis in employment discrimination cases. The Third Circuit, in Dillon v. Coles, 746 F. 2d 999 (3d Cir. 1984), appears to be the only court of appeals to have clearly recognized the importance of the Cooper distinction in defining the role of causal analysis in the liability and relief phases in individual employment dis-

crimination cases. Other courts have simply ignored the Cooper distinction.

III.
CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A FEDERAL DEFENDANT CAN DEFEAT AN ADMINISTRATIVE FINDING OF DISCRIMINATION BY ATTACKING A DISCRIMINATEE'S ENTITLEMENT TO RELIEF BASED ON CAUSAL ANALYSIS

The scheme for administrative resolution of complaints of employment discrimination is set forth in regulations found in 29 C. F. R. § 1613 (1986). These regulations were adopted pursuant to Section 717 of Title VII which provides the Civil Service Commission with authority to issue regulations, orders, and instructions to effectuate the national policy on discrimination with respect to federal employees. If a federal employee receives a favorable decision in an administrative hearing in a Title VII case, she can enforce the decision in district court and the federal agency is not entitled to a trial de novo.

Pecker v. Heckler, 801 F. 2d 709, 711 n. 3 (4th Cir. 1986); Houston v. Nimmo, 670 F. 2d 1375, 1378 (9th Cir. 1982); Moore v. Devine, 780 F. 2d 1559 (11th Cir 1986).

The Sixth Circuit, while recognizing the distinction between a federal and private defendant's right to a de novo hearing, rejected petitioner's argument that, as a federal employee, a favorable finding on liability at the administrative level entitled her to the Moody presumption of effective rightful place and make-whole relief.[36] The decision of the court of appeals in this case conflicts with the Fourth Circuit's decision in Pecker v. Heckler, 801 F. 2d 709 (4th Cir. 1986). Pecker v. Heckler held that a federal employee who has been found to be an actual victim of discrimination at the administrative level is entitled to sue in federal

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[36] 14a.

court for effective relief without a further causal analysis even under the Day v. Mathews rule if effective relief has not been granted in the administrative proceeding.

The Sixth Circuit purported to follow Moore v. Devine, supra, and Pecker v. Heckler, supra, but it, in fact, rejected the rule of those cases by allowing the Army to relitigate the causation element in the relief stage. Neither Moore v. Devine nor Pecker v. Heckler endorses causal analysis when a federal employee seeks to enforce a favorable agency ruling in district court.

This Court should resolve the conflict among the courts on the role of causation in federal employment discrimination cases when a federal employee has been found to be an actual victim of unlawful discrimination in the administrative process and invokes the jurisdiction

of the district court only to seek effective rightful place and make-whole relief under the Moody standards.

IV.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

No. 86-5052

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JANIE L. HASKINS,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE ARMY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed January 8, 1987

Before: KENNEDY and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge. Janie Haskins appeals from the judgment of the district court denying her request for retroactive promotion, back pay, front pay and attorney's fees in this Title VII sex discrimination suit. Appellant claims that the district court committed legal error by considering the issue of "but for" causation—i.e., whether appellant would have been promoted in the absence of discrimination —in the remedial stage of the proceedings. For the reasons which follow, we reject appellant's arguments and affirm the district court.

I

Appellant was first employed by the United States Army as a Military Pay Clerk, a GS-4 civilian position, at Fort Campbell, Kentucky. She entered the Career Intern Budget Analyst Program in 1972, and was promoted to Budget Analyst in the Management Information Systems Office, a GS-9 position, in 1975. In September 1979, a GS-11 permanent position entitled Supervisory Budget Analyst became available and appellant applied for the position.

The Personnel Office initially advertised the vacancy only among Fort Campbell personnel for two weeks. During that time four individuals, all women, applied for the position. Thereafter a selection panel reviewed the applicants as required by the Merit Placement and Promotion Plan (the Plan). On October 18, 1979, the selection panel concluded that appellant was "Highly Qualified" for the position and two of the other candidates were "Best Qualified." Under the Plan, only candidates who were ranked Best Qualified could be considered in the final selection process. The panel then submitted the names of the Best Qualified candidates to Major Wiese, the individual responsible for making the final selection decision.

Before Major Wiese made his decision, however, it was determined that the vacancy could be made available to off-post applicants as well. Major Wiese chose one of the Best Qualified female candidates to temporarily fill the position until a final selection had been made. As a result of expanding the applicant pool, two more people applied for the position, both of whom were men.

In December 1979, the candidates' applications were again submitted to the identical selection panel, and again appellant was only ranked as Highly Qualified. The two women who were previously selected by the panel as well as both men were ranked as Best Qualified, and their names were submitted to Major Wiese. Major Wiese selected one of the men, Mr. Beisel, to fill the GS-11 vacancy.

Appellant filed a formal complaint with the Fort Campbell Equal Employment Opportunity Office on February 15, 1980, claiming that she had been denied the promotion on the basis of her sex. The complaint was investigated by the United States Army Civilian Appellate Review Agency (USACARA); based upon USACARA's recommendations, the Army proposed a finding of no discrimination on July 15, 1980. Thereafter, appellant requested a hearing before the Equal Employment Opportunity Commission (EEOC), and a hearing was held before a Complaints Examiner on November 25, 1980.

The appellant argued before the Complaints Examiner that Mr. Beisel had been preselected for the position and that it had been predetermined that a woman would not fill the vacancy. She also maintained that her qualifications were superior to those of the other candidates, and that had the selection process not been tainted, she would have been selected to fill the vacancy.

Reviewing the evidence under the burden shifting approach articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04 (1973), the Complaints Examiner made several findings. First, the Examiner concluded that appellant had established a prima facie case. Second, the Examiner concluded that the Army had met its production burden of articulating legitimate, non-discriminatory reasons for its selection of Mr. Beisel. Finally, the Examiner concluded that appellant had produced sufficient evidence to establish that Beisel had in fact been preselected for the position, and that the Army's articulated reasons for selecting Beisel were pretextual. Thus, the EEOC Complaints Examiner concluded that the Army had discriminated against appellant on the basis of her sex; this conclusion was reached in spite of the Army's evidence that appellant would not have been selected even in the absence of discrimination. However, relying on *Day v. Mathews,* 530 F.2d 1083 (D.C. Cir. 1976), the Complaints Examiner concluded that the Army had established

that appellant was not entitled to a hiring order or a back pay award. Specifically, the Examiner reasoned that the evidence was "clear and convincing that even absent the impermissible discrimination, the complainant would not have been selected to fill the position."

The Complaints Examiner's findings and the USACARA's recommendations were forwarded to the Office of the Assistant Secretary of the Army (the Army), which issued a decision on July 29, 1981. The Army agreed with the Examiner's finding of discrimination and its conclusion that appellant would not have been selected even in the absence of discrimination; however, the Army concluded that appellant was entitled to an award of priority promotion and attorney's fees. Retroactive promotion and back pay were not awarded.

Appellant thereafter appealed to the EEOC's Office of Review and Appeal. The EEOC issued its final decision on August 6, 1982 which stated in relevant part:

> The Commission has considered the record in its entirety and the attached decision in light of the allegations. The Commission has decided to affirm the agency's final decision as it accurately states the facts and correctly applies the pertinent principles of law.
>
> The record reveals that apellant [sic], a female, was not selected for a position for which a male was the selectee. Whatever the relative merit of the appellant and the male selectee, when appellant competed with only female applicants for the position, she was not selected, and would not have been selected, over at least one of the other competing female applicants.

Dissatisfied with her final award, appellant filed the instant complaint on September 8, 1982 in the United States District Court for the Middle District of Tennessee pursuant to Title VII, 42 U.S.C. §§ 2000e *et seq.* In her complaint, appellant specifically requested "a judicial de novo determination of

the facts," and requested that she be awarded retroactive promotion, back pay, costs and attorney's fees.

On November 25, 1983, the Army filed a motion for summary judgment with the district court. In its memorandum in support of its motion, the Army stated that in a Title VII case, the issue before the court was whether the complainant had been discriminated against. The memorandum further specified that, "[t]his issue, however, was determined in her favor by the Army and upheld on appeal by the EEOC. We do not challenge that determination. There remains only the issue of the relief to which she is entitled." The Army went on to argue that summary judgment should be granted in its favor because a Title VII complainant was not entitled to retroactive promotion and back pay once it is established that the complainant would not have been hired even in the absence of discrimination.

Appellant thereafter filed a motion for partial summary judgment requesting a finding that the Army had discriminated against her on the basis of sex. She asserted that she was entitled to a favorable judgment on the "liability issue" since the Army did not challenge the administrative determination that she had been discriminated against. She further maintained that the Army's motion for summary judgment should be denied because material questions of fact remained in dispute. Specifically, appellant asserted that she would have been promoted in the absence of discrimination because the two women who were ranked Best Qualified for the position were not serious candidates for the job and that her ratings were artificially low because the selection process was tainted.

On February 3, 1984, the district court granted appellant's motion for partial summary judgment on the question of Title VII liability since the Army had "admitted discrimination against the plaintiff." Believing that material questions of fact were in dispute regarding the appropriate relief to be granted, the district court denied the Army's summary judg-

ment motion and set the case for trial. As should be evident from our discussion of the parties' memoranda in support of their summary judgment motions, both the Army and appellant considered the issue before the district court to be whether appellant would have been promoted in the absence of discrimination. Therefore, the parties were initially in agreement that, in order to determine whether appellant was entitled to an award of back pay and retroactive promotion, the district court must make a factual finding that the Army's discrimination was a "but for" cause in appellant's being denied the promotion in question.

A trial was held on this question on March 19-20, 1984, and the district court issued its decision on October 28, 1985. The district court made extensive findings of fact regarding the entire selection process and concluded that appellant would not have been promoted even in the absence of discrimination. Specifically, the district court rejected appellant's assertions that the female candidates who were rated as Best Qualified were not serious candidates, and that the selection process could not be trusted. In reaching this finding, the court, relying on *Day v. Mathews,* 530 F.2d 1083 (D.C. Cir. 1976), held that the burden was on the Army to prove this fact by clear and convincing evidence. Accordingly, the district court denied appellant's request for retroactive promotion and back pay.

Four days after the entry of this order, this Circuit announced its opinion in *Blalock v. Metals Trades, Inc.,* 775 F.2d 703 (6th Cir. 1985). Based on this decision, appellant filed a motion to alter or amend the district court's October 28, 1985 order, asserting a new ground for entitlement to relief. In this motion, she argued that it was legal error for the court to utilize the *Day v. Mathews* "but for" causation test in the remedial stage of a Title VII proceeding. Rather, she argued that under *Blalock,* causation was to be determined in the liability phase of a proceeding; since she had prevailed on the issue of liability, appellant argued that she

was therefore entitled to the relief she requested. In addition, she also requested that a mandatory injunction be issued against the Army and that she should at least be granted priority consideration for the Supervisory Budget Analyst position. She also argued that since she had prevailed on the liability issue she was at least entitled to an award of attorney's fees.

The district court denied appellant's requests on December 10, 1985, reasoning that its October 28, 1985 order was consistent with *Blalock* because "the Army, as employer, had proven clearly and convincingly that the identical 'adverse employment action'—the decision not to promote plaintiff—would have been taken in the absence of discrimination by it." The court refused to grant injunctive relief on the ground that appellant was not adversely affected by the Army's actions. Further, the court denied appellant's request for attorney's fees; since appellant did not receive any of the relief she requested, the court concluded that she was not the prevailing party in the lawsuit.

Haskins appealed from the October 28, 1985 and December 10, 1985 orders; the Army did not file a cross-appeal.

II.

Appellant's primary contention is that the district court committed legal error by applying the *Day v. Mathews* causation test in the remedial stage of the proceedings. She asserts that this court's decision in *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985), precludes such an inquiry, and she also argues that the D. C. Circuit's decision in *Toney v. Block*, 705 F.2d 1364 (D.C. Cir. 1983), limits the applicability of *Day v. Mathews* to class action suits. Since *Blalock* requires a finding of but for causation in order to establish liability, appellant argues that the district court's grant of summary judgment in her favor on the issue of liability, as well as the defendant's admission of discrimination, necessarily contained all the elements of Title VII liability includ-

ing but for causation. Accordingly, appellant reasons, if but for causation has been established as a prerequisite to a finding of Title VII liability, the court may not enter into this inquiry a second time. As a direct result of this argument, appellant asserts that the district court's factual findings are not before this court because the district court committed legal error by applying the *Day v. Mathews* test. Further, appellant maintains that we can neither review nor set aside the district court's finding of liability since the Army failed to appeal from that finding. If we were to adopt this view, appellant concludes that she would be entitled to an appropriate relief award, on remand, according to the principles set forth in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).[1]

Appellant's second major contention is that the instant case is analogous to the Fourth Circuit case, *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986). Appellant asserts that the *Pecker* case stands for the proposition that when the employing agency or the EEOC finds for a plaintiff on the question of liability, then the liability finding cannot be challenged in district court; rather, the only proper question before the district court is whether the agency properly granted relief in accordance with the *Albemarle Paper Co.* and *Franks* cases. It is legal error to proceed under the *Day v. Mathews* case, appellant argues, if a finding of discrimination was made by the administrative agency.

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[1]In *Albemarle Paper Co.*, the Court held that the dual purposes of Title VII—to achieve equality in employment and to provide a "make whole" remedy for victims of discrimination—required that back pay awards be granted to identified victims of discrimination unless a denial of such an award would not frustrate the purposes of the Act. 422 U.S. at 417-21. The *Franks* case reiterated the principles enunciated in *Albemarle* regarding the breadth of power federal courts have in fashioning appropriate relief.

In the instant case, appellant emphasizes that the Army's admission of discrimination incorporated the administrative finding of liability pursuant to the *McDonnell Douglas* framework. Since the *McDonnell Douglas* test includes a factual finding of pretext, and since this court has specified that a finding of pretext is the equivalent of a finding of "but for" causation, *see Goostree v. Tennessee,* 796 F.2d 854, 863 (6th Cir. 1986), appellant concludes that the Army's admission included an admission of causation. Thus, appellant would be entitled to a presumption of all forms of appropriate relief according to *Albemarle Paper Co.* and *Franks.*

Having prevailed on the liability issue, appellant also asserts that the district court abused its discretion by failing to issue a mandatory injunction against future discrimination by the Army. Similarly, appellant maintains that she is entitled to receive attorney's fees and costs.

III.

It is well-settled that the responsibility of factfinding is that of a district court, and that specific findings may not be set aside on appeal unless those findings are clearly erroneous. *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982); Fed. R. Civ. P. 52(a). This deferential standard does not apply to conclusions of law, however, *see Pullman-Standard,* 456 U.S. at 287, or to factual findings which result from the application of incorrect legal principles. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 855 n.15 (1982). As noted above, appellant maintains that the district court committed legal error.

A. Causation

We believe that the principal question before this court is whether our recent opinion in *Blalock* precludes a district court from resolving a factual dispute over causation in the remedial stage of a claim if such a question has not yet been resolved by the district court. In addition, we must determine

whether the Army's admission of liability based on the administrative findings has any effect on our analysis of this case. For the reasons which follow, we conclude that neither *Blalock* nor the Army's admission barred the district court from resolving the factual dispute over causation.

In *Blalock*, this court for the first time set forth guidelines for analyzing a dual motive Title VII case, including the burdens which must be carried by the parties on the issue of causation. In a non-dual motive case, where the issue is which of two alternative reasons is the "true" reason for the adverse employment action, the court noted that the Title VII plaintiff has the burden of persuasion to establish that the unlawful motive was more likely than not the basis of the employer's decision. 775 F.2d at 709. This is "but for" causation under the *McDonnell Douglas* test. However, when it is alleged that the Title VII plaintiff would not have been hired or promoted even in the absence of the unlawful discrimination,—i.e., that there was more than one reason for the adverse employment action—we held that the causation standard, or "same decision" test, of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) applied. *Blalock*, 775 F.2d at 712. Under the *Mt. Healthy* test, once a plaintiff has met his or her burden of showing that the illegal conduct more likely than not was a motivating factor in the employment decision, the defendant must be given the opportunity to show, by a preponderance of the evidence, that the same decision would have been reached even in the absence of discrimination. *See id.* at 710-12. *Cf. East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 404 n.9 (1977) (where Court noted that an employer would be entitled to prove at trial that a claimant would not have been hired, even if there was a showing of discrimination). If the employer meets this burden of production, there is no Title VII liability.

In our Circuit, therefore, the "same decision" causation test is to be applied in determining whether there is Title VII

liability, rather than in fashioning the appropriate relief. This is contrary to the approach some courts have adopted. *See, e.g., Bibbs v. Block,* 778 F.2d 1318 (8th Cir. 1985) (en banc), *modifying* 749 F.2d 508 (8th Cir. 1984); *Day v. Mathews,* 530 F.2d 1083 (D.C. Cir. 1976).[2] Were district courts to apply the *Blalock* standard in a procedurally accurate manner, they would decide the question of causation before entering summary judgment on the liability issue. In such a case, the question of causation could not be reopened in the remedial stage

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[2]We are unpersuaded by appellant's assertion that the D.C. Circuit's opinion in *Toney v. Block,* 705 F.2d 1364 (D.C. Cir. 1983) limited the *Day v. Mathews* "same decision" approach to class action suits. In *Day v. Mathews,* evidence of discrimination in the particular employment decision was produced by the claimant; under such circumstances, the court reasoned that "liability" was established, and that the burden then shifted to the employer to prove by clear and convincing evidence that the individual would not have been hired or promoted in the absence of discrimination. In *Trout v. Lehman,* 702 F.2d 1094 (D.C. Cir. 1983), *vacated on other grounds,* 465 U.S. 1056 (1984) and *McKenzie v. Sawyer,* 684 F.2d 62 (D.C. Cir. 1982), the court extended the burden shifting approach in *Day v. Mathews* to class action suits. In *Trout,* the court held that once class-wide discrimination was shown, individual members of the class were presumptively entitled to relief. Accordingly, liability was established upon a showing of class-wide discrimination, and the burden shifted to the employer in the remedial stage to prove that the individual class members would not have been promoted or hired in the absence of discrimination.

Like the *Trout* case, *Toney v. Block* only contained evidence of systemic discrimination, not discrimination in a particular employment decision. However, unlike *Trout, Toney v. Block* was not a class action suit. The court in *Toney v. Block* held that in an individual disparate treatment case, evidence of discrimination-at-large was not adequate to provide a claimant with the presumption of entitlement to relief and could not justify a shifting of the burden to the employer. Rather, the evidence was merely adequate to establish a prima facie case. Nothing in *Toney v. Block* relates to a court's ability or inability to review the "same decision" test in the remedial stage; rather, it holds that class-wide discrimination is inadequate to establish liability in an individual disparate treatment case. Seen in its correct light, *Toney v. Block* actually limits the *Trout* case, and is consistent with *Day v. Mathews.*

since it would already have been decided that the plaintiff would have been promoted in the absence of discrimination.

In the instant case, the district court entered summary judgment on the issue of Title VII liability based on the administrative proceedings. At the administrative level, a finding of liability was entered pursuant to the *McDonnell Douglas* standard, and the "same decision" test was not applied until the remedial stage. The conclusion is inescapable that neither the EEOC nor the employing agency approached this case under the standards enunciated in *Blalock*; rather, at each stage in the administrative process, it was noted that "but for" causation under *McDonnell Douglas* was adequate to enter a liability finding, despite the additional finding that appellant would not have been promoted in the absence of discrimination. This case, therefore, was treated as a single motive case in establishing liability in the administrative and district court proceedings. The second motive was only acknowledged when a remedy was being formulated.[3]

While *Blalock* requires the "same decision" causation standard to be applied in making a liability determination, we hold that *Blalock* does not preclude a district court from applying the "same decision" test in fashioning a remedy,

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[3]As noted above, appellant also maintains that a finding of pretext pursuant to the *McDonnell Douglas* test is the equivalent of a finding of causation, citing to *Goostree v. Tennessee*, 796 F.2d 854 (6th Cir. 1986) for this proposition. Since the liability finding at the administrative level included a finding of pretext, appellant maintains that the district court was precluded from reviewing the question of causation in the remedial stage. This analysis ignores the distinction between causation in a single motive case and causation in a dual motive case. In a dual motive case, such as the case at bar or *Blalock*, a finding of pretext does not necessarily translate into Title VII liability. Rather, if the employer satisfies its burden of showing that the adverse employment decision would have been made in the absence of the discriminatory, pretextual conduct, but for causation within the context of a dual motive case has not been established.

when that court has proceeded under the assumption that such an inquiry is not part of a liability determination. In the instant case, the district court did not have the benefit of *Blalock* when it rendered its judgment on October 28, 1985, and there is absolutely no doubt that the *Blalock* causation standard was not applied in the "liability phase." To hold that *Blalock* precludes this inquiry by the district court or by this court on appeal simply because the district court held that liability had been established would be inconsistent with the principles enunciated in *Blalock* since it would permit an award of back pay or retroactive promotion absent a finding of but for causation—a result certainly not contemplated by *Blalock*. Such a rationale would effectively place form over substance, and would ignore the unique posture this case was in when our Circuit articulated the appropriate causation standard for a dual motive case. We decline to accept appellant's assertion that when a district court makes a finding of Title VII liability, that finding must be construed to be equivalent to a finding of liability under *Blalock*. A district court's findings, as with a party's admissions, must be analyzed in the setting they were made; in the instant case, the record makes it abundantly clear that the "same decision" test was perceived, by each party and by the district court, as an appropriate inquiry for the remedial stage. Since it is clear that a defendant must be afforded an opportunity to prove that the plaintiff would not have been promoted even in the absence of discrimination, it did not constitute reversible error for the district court to enter into this inquiry after entering summary judgment on the liability issue.

Further, pursuant to appellant's motion to alter or amend the district court's October 28, 1985 order, the district court determined on December 10, 1985 that its denial of relief was consistent with *Blalock*. Specifically, the court emphasized that under *Blalock* the relief requested by appellant could not be granted since the Army had established by clear and convincing evidence that appellant would not have been promoted even in the absence of discrimination. We agree

with the district court's conclusion. While the court's analysis did not procedurally adhere to *Blalock's* guidelines, the necessary questions were addressed and the correct result was reached.

Our opinion is not swayed by the fact that a finding of liability was entered in appellant's favor at the administrative level and that the Army admitted to liability in this action based on those findings. We do not take issue with appellant's assertion that a federal employee can request a federal court to enforce a favorable EEOC order without having to risk a de novo review on the merits. *Cf. Pecker v. Heckler,* 801 F.2d 709, 711 n.3 (4th Cir. 1986); *Moore v. Devine,* 780 F.2d 1559,1563 (11th Cir. 1986), *modifying* 767 F.2d 1541 (11th Cir. 1985); *Houseton v. Nimmo,* 670 F.2d 1375, 1378 (9th Cir. 1982).[4] However, we do not accept appellant's suggestion that a favorable liability finding at the administrative level automatically entitles a Title VII plaintiff to the presumption that back pay and a retroactive promotion should be awarded by a federal district court. Rather, as noted above, a liability determination must be reviewed in the context that it was made; facts which were not resolved by the EEOC in making such a determination cannot be read into such a finding upon

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[4]These cases acknowledge the distinction between federal employee cases and private-sector cases. Pursuant to statute and regulations, the federal employing agency and the EEOC are empowered to enter final orders which are binding on the employing agency. *See* 42 U.S.C. § 2000e-16; 29 C.F.R. §§ 1613.201 *et seq.* In a private-sector case, the EEOC does not have the power to issue final decisions which are binding on the employer. If a federal employee has received a favorable determination at the administrative level, he or she is able to go into federal court to enforce that order without risking de novo review of the merits. Thus, the employing agency cannot challenge issues decided against it if the plaintiff does not seek de novo review. However, a plaintiff is entitled to a de novo hearing if requested. *Chandler v. Roudebush,* 425 U.S. 840, 861-64 (1976). In such a case, the district court is not bound by the administrative findings. *See Moore v. Devine,* 780 F.2d at 1564 (noting that plaintiff "pled and tried the merits of this claim").

a claimant's demand. Although we agree that the factual findings underlying an administrative liability determination must be accepted by the district court if the plaintiff so requests, we reject the proposition that an EEOC liability finding necessarily translates into a liability finding under the standards set forth in *Blalock*.

In the instant case, the liability finding established that sex was a factor in the promotion decision, but the finding did not include a "same decision" test analysis; in other words, causation was not established. In accordance with appellant's requests, the district court did not conduct a de novo review of the facts underlying the liability finding. Rather, the court only conducted a de novo review of the facts necessary to determine whether appellant would have been promoted in the absence of discrimination. This, too, was in accordance with appellant's wishes; she specifically requested a de novo judicial determination of these facts since the issue of entitlement to back pay and retroactive promotion had been decided against her at the administrative level.

Due to the scope and content of the administrative findings, this case is distinguishable from *Pecker v. Heckler* 801 F.2d 709 (4th Cir. 1986), upon which appellant relies. As in the instant case, the employing agency in *Pecker v. Heckler* did not challenge the liability determination, and the district court concluded that the only issue before the court was whether the plaintiff was entitled to more relief. Unlike this case, however, the EEOC in the *Pecker v. Heckler* case had determined, in accordance with the *Day v. Mathews* standard, that the plaintiff would have been promoted in the absence of discriminatory conduct. *See Pecker v. Heckler,* 801 F.2d at 711 n.4.[5] Therefore, by adopting the administrative find-

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[5]We cannot accept appellant's argument that *Pecker v. Heckler* precludes a district court from applying the *Day v. Mathews* test once Title VII liability is established. Rather, *Pecker v. Heckler* cites to *Day v. Mathews* with approval, noting that the employing agency had failed to meet its burden under that test.

ings, the district court also adopted a "same decision" test analysis which was favorable to the plaintiff. The difference in the instant case and *Pecker v. Heckler* is obvious: the district court in the instant case did not, and could not, adopt a favorable "same decision" test analysis based on the administrative findings since the EEOC had resolved that issue against appellant. Accordingly, appellant did not enter district court having already established an entitlement to retroactive promotion and back pay. Under the present circumstances, it would have constituted legal error for the district court to award back pay and retroactive promotion based solely on the administrative record.

The argument pressed by appellant would require us to ignore the established facts and to eliminate the question of causation from the Title VII analysis. Appellant's reasoning would effectively eliminate the "same decision" inquiry from the administrative and federal court proceedings. We cannot adopt such a theory, nor can we imagine that any other court would do so. Although federal courts are in disagreement over whether the "same decision" test is an appropriate inquiry for the liability or remedial stage, they are in general agreement that such an inquiry must be made in a dual motive case before a plaintiff can be awarded retroactive promotion and back pay. Title VII does not require federal courts to grant plaintiff a windfall, but only requires an award of "make whole" relief. In the instant case, since we find that the district court did not commit legal error and that its factual findings are not clearly erroneous, an award of retroactive promotion and back pay would have constituted a windfall to appellant. We affirm the district court's denial of this relief.

B. Other Relief

Based on the facts of this case and our conclusions above, we also find that the district court did not abuse its discretion in denying appellant's request for injunctive or declaratory

relief. Further, the district court did not err in denying appellant's request for attorney's fees. The Army's admission in and of itself does not confer prevailing party status on appellant. Rather, since she was found to not be entitled to the relief she requested, she is not the prevailing party.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

JANIE L. HASKINS	)	
	)	
VS.	)	DOCKET NO. 82-3760
	)	
THE DEPARTMENT OF THE ARMY	)	[Dec. 10, 1985]

MEMORANDUM

Pending before the Court are plaintiff's motions (1) for this Court to alter or amend its October 28, 1985 judgment in favor of defendant on plaintiff's Title VII claim for retroactive promotion and back pay and (2) for an award of attorney's fees. Despite finding discrimination on the part of the defendant in its preselection of Charles Beisel for the Supervisory Budget Analyst position, the

Court entered judgment for defendant because it was able to prove clearly and convincingly that, even in the absence of such discrimination, plaintiff nevertheless would not have been selected to fill the vacant post. Stated differently, this Court concluded that defendant's discrimination had not caused plaintiff's nonselection inasmuch as other, better qualified applicants were available for the position. For the reasons discussed hereinafter, plaintiff's motions are DENIED.

This Court, as a basis for its October 28, 1985 judgment, relied upon Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976), for the proposition that, once discriminatory animus has been proved, defendant is entitled to the

opportunity to prove that the same employment decision would have been reached even absent the discrimination. In its motion to alter or amend, plaintiff argues that, as a result of the recent Sixth Circuit decision in Blalock, v. Metals Trades, Inc., No. 84-3714 (6th Cir., October 24, 1985), this Court's reliance on the Day case was erroneous. After reviewing Blalock, this Court concludes that that decision in no way opposes Day, but instead supports and, in fact, cites with approval to Day. Blalock, slip op. at 16. The precise holding of Blalock was expressed as follows:

> Accordingly, we hold that in order to prove a violation of Title VII, a plaintiff need demonstrate by a preponderance of the evidence that the employer's decision to take an adverse em-

> ployment action was more likely than not motivated by a criterion proscribed by the statute. Upon such proof, the employer has the burden to prove that the adverse employment action would have been taken even in the absence of the impermissible motivation, and that, therefore, the discriminatory animus was not the cause of the adverse employment action.

Id. at 19. Although citing to and employing the language of Day in its memorandum, this Court in effect also followed the Blalock approach when it concluded that the Army, as employer, had proven clearly and convincingly that the identical "adverse employment action" -- the decision not to promote plaintiff -- would have been taken even in the absence of discrimination by it.

In her motion to alter or amend, plaintiff also asks this Court to issue a mandatory injunction against the Army,

directing it to afford plaintiff priority consideration for the Supervisory Budget Analyst position, which recently has become vacant once again. Plaintiff further requests this Court to enter a declaratory judgment in her favor "in view of the national policy against discrimination on the basis of sex." Inasmuch as this Court conclusively believes that the Army's preselection of Major Beisel did not adversely affect plaintiff due to the availability of other, better qualified applicants, neither injunctive nor declaratory relief would be proper at this time. To grant either form of relief would, in effect, be an act of discrimination in favor of plaintiff, in that plaintiff would receive a benefit not afforded to the other potential, innocent applicants for the position. For all of the above rea-

sons, plaintiff's motion to alter or amend is DENIED.

Plaintiff has also applied for an award of attorney's fees resulting from this litigation. Pursuant to 42 U.S.C. § 2000e-5(k), a court, in its discretion, may allow the prevailing party in a Title VII action reasonable attorney's fees. This Court does not find plaintiff to have been the prevailing party in this litigation. Plaintiff brought this action seeking retroactive promotion and back pay as a result of discrimination by defendant. Although the fact of preselection by the Army was established, this Court found that plaintiff was not adversely affected by the action and, as a result, entered judgment for defendant and denied plaintiff the relief she had requested. Under this set of facts, this Court believes it

proper to DENY plaintiff's application for attorney's fees. An Order will be entered contemporaneously with this Memorandum.

This the 9th day of December, 1985.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNESSEE,
NASHVILLE DIVISION

JANIE L. HASKINS	)	
	)	
VS.	)	DOCKET NO. 82-3760
	)	
THE DEPARTMENT	)	
OF ARMY	)	[Dec. 10, 1985]

ORDER

For the reasons discussed in the contemporaneously entered Memorandum, this Court hereby DENIES plaintiff's motion to alter or amend the Court's October 28, 1985 judgment and DENIES plaintiff's application or attorney's fees.

Entered this the 9th day of December, 1985.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

JANIE L. HASKINS	)	
	)	
VS.	)	DOCKET NO. 82-3760
	)	
THE DEPARTMENT OF THE ARMY	)	[Oct. 28, 1985]

MEMORANDUM

This action involves plaintiff's claim that defendant intentionally discriminated against her on the basis of her sex by failing to promote her to a position for which she had applied. She brings the action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., seeking retroactive promotion and back pay. Jurisdiction is invoked under 42 U.S.C. § 2000e-16. Defendant has ad-

mitted to liability with respect to the charge of discrimination, and, thus, the Court granted summary judgment in plaintiff's favor on this question. Nevertheless, defendant argues that, absent discrimination, plaintiff still would not have been selected to fill the position. The matter came on for trial on March 19-21, 1984; this Memorandum constitutes the Court's findings of facts and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. For the reasons discussed herein, the Court concludes that, even in the absence of discrimination, plaintiff would not have been selected to fill the position in question. Therefore, JUDGMENT is entered for defendant.

Plaintiff is a civilian employee with the United States Army at its Fort Campbell post. She began her employment there in August of 1966, when the Army hired her to fill the position of GS-4 Military Pay Clerk. By 1972, plaintiff had entered into a Career Intern Budget Analyst Program, and in 1975, the Army promoted her to a GS-9 Budget Analyst at the Management Information Systems Office. She continued to hold the above GS-9 position at the time in which she filed the complaint in the present lawsuit.

In April of 1979, Ms. Eloise Allison retired from her position as Supervisory Budget Analyst, GS-11, for the Force Development Division of G-3 Directorate of Plans and Training, thereby creating the vacancy that is

the subject of this controversy. In general, the Supervisory Budget Analyst is responsible for the budgetary functions relative to the operations and training of the 101st Airborne Division (Air Assault) at the Fort Campbell base.

On May 20, 1979, Ms. Betty McCain, a GS-9 Budget Analyst, was appointed to fill the vacancy as the Acting Supervisory Budget Analyst on a temporary, noncompetitive basis, not to exceed 120 days. In August of that year, Major (now Lieutenant Colonel) Frederick W. Wiese transferred to Fort Campbell as Chief of the Force Development Division. Major Wiese, as one of his duties, assumed supervision over the Budget Section and thereby had the responsibility for filling the

Supervisory Budget Analyst's position on a permanent basis. Inasmuch as Ms. McCain's temporary appointment was due to expire in mid-September, a request to recruit for a permanent replacement was sent to the Fort Campbell Civilian Personnel Office ("CPO" or "Personnel Office") on August 20, 1979. Thereafter, the Personnel Office issued a formal announcement seeking applicants to fill the position.

This announcement ran from September 10-24, 1979 and, because of an Office of Personnel Management "Stopper List", only Fort Campbell personnel were entitled to apply.[1] Four indi-

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[1]A "Stopper List" contains names of individuals who are entitled to priority job placement consideration. Such individuals consist of current Department of Defense civilian employees who possess the necessary skills

viduals, Ms. Betty McCain, Ms. Sandra Berry, Ms. Ann Neal, and plaintiff, applied for the position.

Under the Fort Campbell, Kentucky Merit Placement and Promotion Plan ("Plan"), which governs all promotion and job selection actions at the facility, the Personnel Staffing Specialist has the responsibility to name a selection panel to rate the applicants. The Plan provides that per-

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and who are being either downgraded or terminated by a reduction in force at another Department of Defense location. Once a CPO receives a stopper list with a qualifying registrant on it, the Placement Office is precluded from recruiting off-post personnel and is limited to filling the vacancy with a current Department employee. Should the stopper list become cleared, the Department is empowered to recruit from outside sources.

sons selected to serve on the panel must be knowledgeable in the line of work in which the vacancy exists and must be equivalent in grade level to the vacant position. Ms. Sara Harper, a Staffing Specialist for eighteen (18) years, randomly selected Ms. Margaret Paschall, Ms. Carolyn Jackson, and Ms. Mary Rice to serve on the panel. Ms. Harper provided the panel members with a crediting plan and job analysis (prepared by Major Wiese), furnished them personnel files and appraisals of each of the candidates, and explained to them the rating procedures. Ms. Harper acted as an advisor to the panel, but did not participate in the evaluation of the candidates or in the decision making.

On October 18, 1979, the panel met to rate the four candidates. Ratings were based both upon the job criteria stated in the crediting plan and upon the information contained in the applicants' personnel folders. After reviewing the information, the panel proceeded to rank Ms. McCain and Ms. Berry as "Best Qualified" and Ms. Neal and plaintiff as "Highly Qualified."[2]

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[2]Paragraph 7-12c of the Merit Placement and Promotion Plan, Chapter 7, CAM Reg. 690-1, provides as follows:

Step 3 - Ranking/Determining Best Qualified Candidates. Based upon rating procedures described in Step 2 above, eligible candidates will be grouped in the following categories:

(1) Group I - Best qualified. These candidates will rank at the top when compared with other eligible candidates. They will be composed of highly qualified candidates when available and may be composed of eligible candidates when highly qualified candidates are not available.

Only candidates rated as Best Qualified may be considered for final selection. In this regard, the panel submitted the names of Ms. McCain and Ms. Berry to the selection official, Major Wiese, on October 18, 1979. Prior to Major Wiese's decision, however, Ms. Harper learned that the sole candidate who had been on the Stopper List was no longer available for the position, which meant that both on-post and off-post individuals could be recruited for the position. Major Wiese thereupon, on October 25, 1979,

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(2) Group II - Highly qualified but not among the best qualified.

(3) Group III - Eligible but not highly qualified.

again appointed Ms. McCain to the vacant position on a temporary basis and began to accept additional applications for the position. Ultimately, in addition to the four original applicants, two additional candidates were added for consideration -- Mr. Charles Beisel and Mr. William Otte.

Charles Beisel had retired from active duty as a major with the Army on March 30, 1979. Thereafter, he remained on active reserve in the Supply Office at Fort Campbell until he retired from that status on September 30, 1979. The evidence shows that Mr. Beisel was interested in filling the position of Supervisory Budget Analyst subsequent to Ms. Allison's retirement and that defendant took

steps to assure that Mr. Beisel could be considered for the position. Prior to the posting of the vacancy announcement in September of 1979, Major Wiese learned that a request for "midlevel certification" for Mr. Beisel had been submitted. A midlevel certification serves as a waiver to the federal regulation which prohibits a retired military officer from being employed at the same duty station from which he has retired for a period of 180 days subsequent to the date of retirement. The evidence supports a finding that Major Wiese learned that Colonels Crysel, Aquanno, and Kinzer had discussed with Bruce Law, the head of the CPO, the possibility of procuring the waiver for Mr. Beisel.

In late November of 1979, the selection panel again convened to consider the candidates for the position of Supervisory Budget Analyst. By this time, both Charles Beisel and William Otte, having received midlevel certification, had qualified as candidates in addition to the original four female applicants. The panel members consisted of the same individuals who had served on the previous panel. The panel proceeded to evaluate the applicants, using the same criteria as they had employed previously. The resulting December 5, 1979 report of the panel ranked four candidates -- Ms. McCain, Ms. Berry, Mr. Beisel, and Mr. Otte -- as Best Qualified and two candidates -- Ms. Haskins and plaintiff -- as Highly Qualified. The

panel submitted the names of the four candidates who rated as Best Qualified to Major Wiese, who subsequently officially selected Mr. Beisel to fill the vacancy.

After plaintiff had learned that she had not been selected for the position of GS-11 Supervisory Budget Analyst at G3/DPT, she filed a complaint of discrimination with the Fort Campbell Equal Employment Opportunity Office. Her complaint was investigated by a member of the United States Army Civilian Appellate Review Office, who found adversely to plaintiff. She then requested a hearing before the Equal Employment Opportunity Commission ("EEOC"). The EEOC hearing occurred on November 25, 1980, and the findings of the Examiner were for-

warded to the Office of the Assistant Secretary of the Army, which issued its decision on June 16, 1981. The decision noted that the evidence supported a finding of discrimination inasmuch as Mr. Beisel was found to have been preselected for the position. However, because the evidence further showed clearly and convincingly that, even absent discrimination, the plaintiff would not have been selected to fill the vacancy, plaintiff's relief was limited to priority job consideration and attorney's fees. Retroactive promotion and back pay were not ordered. Plaintiff, disagreeing with the finding that she would not have been selected for the job even absent discrimination, thereupon appealed to the EEOC Office of Review and Appeals.

After that office failed to provide the relief she had requested, plaintiff initiated the present lawsuit.

In appropriate cases, a court is empowered to order retroactive promotion and back pay to victims of discrimination. 42 U.S.C. § 2000e-5(g). However, "[n]o order of the court shall require the ... promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused ... advancement ... for any reason other than discrimination on account of race, color, religion, sex, or national origin ...." Id.

The District of Columbia Circuit, in Day v. Mathews, 530 F.2d 1083, 1084-85 (D.C. Cir. 1976), discussed the above provision as follows:

Discrimination is of course a serious matter wherever it appears, and the supervising officials should take action to root it out, whether or not the applicant in a particular case would have been hired or promoted absent the discrimination. But when retroactive promotion and back pay are sought, further questions must be answered. The statute makes it clear that these forms of relief are available only where the employee would have received the promotion had he not been the victim of discrimination. From the case law, too, it is plain that the purpose of a back pay award is to make the plaintiff whole - that is, to restore him to the position he would have occupied but for the discrimination. See, e.g., Albemarle Paper Co v. Moody, 422 U.S. 405, 418-423, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); EEOC v. Detroit Edison Co., 515 F.2d 301, 315 (6th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 261 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). Unless the court finds that [the plaintiff] would otherwise have been promoted, back pay is inappropriate.

Inasmuch as the Court has resolved the discrimination issue in plaintiff's favor, the burden of proof shifts to defendant to prove that, even absent such discrimination, plaintiff nevertheless would not have been selected to fill the vacant position. See Day, 530 F.2d at 1085. Moreover, defendant must prove the above fact by "clear and convincing evidence." Id. See also Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 445 (5th Cir.), cert. denied, 419 U.S. 1033 (1974).

> Clear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required

> as in criminal cases. It does not mean clear and unequivocal."

Hobson v. Eaton, 399 F.2d 781, 784 n.2 (6th Cir. 1968) (quoting with approval from Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118, 123 (1954)).

To support its contention that plaintiff would not have been selected to fill the Supervisory Budget Analyst position even absent discrimination, defendant relies upon the fact that an impartial selection panel rated three individuals in addition to Mr. Beisel as being better qualified than plaintiff. Perhaps more significantly, defendant notes that two of these individuals are females and contends that this fact conclusively proves that, even had sex discrimination not been directed against plaintiff, an individual other than plaintiff nevertheless would

have received the promotion. In an attempt to discredit defendant's position, plaintiff contends both that she was the only serious female candidate for the job and that improper procedures were employed in selecting the most qualified applicant.

Plaintiff claims that, absent discrimination, she would have been selected to fill the vacancy because Ms. McCain and Ms. Berry, the two women whom the panel ranked ahead of her, were not serious candidates for the position. Plaintiff notes that Ms. McCain, on various occasions, indicated that she was not interested in filling the vacancy on a permanent basis, that she wanted Mr. Beisel to have the job, and that she had applied for the position only to see whether she would qualify for it. At trial, Ms. McCain explained that she had wanted Mr. Beisel to

have the job because it was her opinion that he was the best qualified applicant and that she, in fact, had not been interested in filling the vacancy on a permanent basis as long as Mr. Beisel was available for the position. Such comments in no way suggest that Ms. McCain would have declined the offer had Mr. Beisel been unavailable for consideration. In fact, she testified that she would have taken the job had it been offered to her. Additionally, the fact that Ms. McCain originally applied for the position for the purpose of learning whether or not she would qualify for it in no way reflects negatively upon her later testimony that she would have accepted the job were it to have been offered to her. This Court, after reviewing the evidence, concludes that Ms. McCain was a serious candidate

for the Supervisory Budget Analyst position.

Plaintiff makes an even less compelling argument that Ms. Berry was not a serious candidate for the vacancy. Plaintiff cites to comments made by Ms. Berry that she considered Mr. Beisel the best candidate and that she did not care whether or not she got the job as contradictory of her later statement that, had she been selected for the position, she certainly would have accepted it. This Court does not find the statements to be contradictory and, based upon the evidence, concludes that Ms. Berry too was a serious candidate for the position in question.

In arguing that an improper procedure was employed in choosing the most qualified applicant(s), plaintiff contends that the panel and Ms. Harper manipulated the

criteria and weighted the system so as to preclude plaintiff from being designated as Best Qualified. This Court finds no improper action to have been committed by the selection panel. The proof indicates that the panel read each of the personnel folders three times and that no portion of plaintiff's file was ignored. The proof further shows that all of the applicants were rated according to the same crediting plan and that the panel accorded plaintiff a numerical score that was two points less than the score received by the Best Qualified applicants. Plaintiff asserts that, although the purpose of the crediting plan was to make the evaluation objective, the individual panel members made subjective determinations. However, as noted by defendant, a panel's evaluation necessarily involves subjective determina-

tions even though the candidates are rated by objective standards. This Court is convinced that the panel, to the extent feasible, adhered to the objective criteria before them and that they performed their function properly.

Plaintiff claims that Ms. Harper, as the CPO advisor to the selection panel, acted improperly by "modifying the crediting plan so as to restrict competition." In particular, plaintiff alleges that Ms. Harper, in her own handwriting, added to the plan additional examples of qualification to be relied upon by the panel in rating the candidates and that such additions were made "for a purpose other than to aid the panel since Ms. Harper had earlier testified that the panel members were experienced under the requirements for filling the job and thus able to make

judgment on rating the candidates." It is undisputed that Ms. Harper did, in fact, place handwritten comments on the crediting plan, but this fact, by itself, does not suggest any impropriety. According to defendant, Ms. Harper offered the comments only as examples of qualification and, in this connection, used the letters "EG" to signify this fact. Ms. Carolyn Jackson, a panel member, testified at trial that all of the panel members understood Ms. Harper's comments were to be considered as examples only and that such examples did not alter the crediting plan criteria. Further, the fact that the panel members were experienced and capable of rating the candidates in no way suggests impropriety on the part of Ms. Harper in providing to the panel examples of qualification.

This Court concludes that improper procedures were not employed in selecting the most qualified applicant for the position of Supervisory Budget Analyst. Further, since the two other females who qualified as Best Qualified were serious candidates who would have accepted the job offer had it been offered to them, this Court concludes that defendant has clearly and convincingly proved that, absent discrimination by it, plaintiff nevertheless would not have been selected to fill the vacancy. Therefore, it is the JUDGMENT of this Court that plaintiff is neither entitled to retroactive promotion nor entitled to back pay. An ORDER in accordance with this Memorandum will be contemporaneously entered.

This the 28th day of October, 1985.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

JANIE L. HASKINS	)	
	)	
VS.	)	DOCKET NO. 82-3760
	)	
THE DEPARTMENT OF THE ARMY	)	[Oct. 28, 1985]

ORDER

For the reasons discussed in the contemporaneously entered memorandum, JUDGMENT is hereby entered for defendant.

Entered this the 28th day of October, 1985.

UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

JANIE L. HASKINS	)	
	)	
VS.	)	DOCKET NO. 82-3760
	)	
U.S. DEPARTMENT OF THE ARMY	)	[February 3, 1984]

O R D E R

This matter came on for hearing upon the parties' cross-motions for summary judgment and partial summary on the issues of liability and relief in this Title VII action on February 1, 1984. At the conclusion of the hearing, the Court GRANTED the plaintiff's motion for partial summary judgment on the liability issue, it appearing that the defendant admitted

discrimination against the plaintiff. The Court DENIED the defendant's motion for summary judgment on the issue of relief, it appearing that disputed issues of material fact existed. It was also apparent that the parties did not agree on the applicable regulations.

Entered this the 3rd day of February, 1984.

UNITED STATES DISTRICT JUDGE

Set for trial: Monday, March 19, 1984 at 9:00 a.m.

[In Joint Appendix in the Sixth Circuit, pp. A57-A63]

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

29 JUL 1981

Ms. Janie L. Haskins
146 West Park
Clarksville, Tennessee 37040

Docket Number: 81-01-050

Dear Ms. Haskins:

This is in reference to your equal employment opportunity complaint, dated 15 February 1980, in which you allege discrimination on the basis of your sex (female) in connection with your nonreferral and subsequent nonselection for the position of Supervisory Budget Analyst, GS-560-11, with

G3/ Directorate of Plans and Training (DPT), Force Development Division, Program and Budget Branch, Headquarters, 101st & Airborne Division (Air Assault) and Fort Campbell, Fort Campbell, Kentucky, duty location Tennessee, when a male military retiree, Mr. Charles C. Beisel (LTC Ret), was selected.

I have reviewed and evaluated all of the information in your complaint file, including the US Army Civilian Aopellate Review Agency (USACARA) Investigator's Report (IR) and the findings and recommended decision of the Equal Employment Opportunity Commission (EEOC) Complaints Examiner. The

Examiner's report (ER) (Incl 1), and hearing transcript (HT) (Incl 2), are inclosed. In accordance with the provisions of Federal Personnel Manual Letter 713-42, dated 13 March 1978, and adopted by the EEOC on 29 December 1978, a copy of this decision is being provided to the alleged discriminating officials. A copy of this decision, and of the Complaints Examiner's report, is also being furnished to your representative, Ms. Carol McCoy, Attorney.

Based on my review and evaluation of your complaint, I have decided to adopt the Complaints Examiner's recommended decision for a finding of dis-

crimination based on sex. The reasons for my decision are set forth in the following paragraphs:

In individual complaints of discrimination, it is the complainant's burden to first establish a prima facie case. Once established, the burden shifts to management officials of the activity to articulate legitimate, nondiscriminatory reasons for its actions. Then the complainant must be afforded an opportunity to show that management's articulated reasons were, in fact, a pretext for discrimination. The elements for establishing a prima facie case of discrimination in connection with your

nonselection are that: (1) you are a member of a protected group under Title VII of the Civil Rights Act of 1964 as amended; (2) you applied and were qualified for a job for which the activity was seeking ap.plicants; (3) despite your qualifications, you were rejected; and (4) after your rejection, the position remained open and the activity continued to seek applicants with your qualifications or, in the alternative, some other evidence indicating disparate treatment.

With respect to the aforecited elements for establishing a prima facie case, I am in agreement with the Complaints Examiner that there is suffi-

cient evidence of record to support a prima facie case of discrimination because of sex. In this regard, the evidence shows that you applied in a timely manner for the position in question which was advertised under a Merit Promotion Vacancy Announcement Number 95-79 with an opening date of 10 September 1979, and a closing date of 24 September 1979; you were highly qualified; despite your qualifications, you were rejected, the activity continued to seek applications from persons of your qualifications and a male applicant was selected for appointment to the position at issue.

As indicated above, the burden now shifts to management officials of the Memphis District to articulate legitimate, nondiscriminatory reasons for their actions. Based on the following, this burden has been met. I note from the record that recruitment action for the position in question was initiated sometime in August 1978, when Ms. Eloise A. Allison, former incumbent, retired. In the interim, Ms. Betty L. McCain, Budget Analyst, GS-560-9, an employee in the Budget Branch, G3/DPT, was non-competitively temporarily promoted to the position from 17 June 1979 through 18 September 1979, (prior to the issuance of the vacancy announcement). The position

was advertised under Merit Promotion Vacancy, Job Opportunity Announcement Number 95-79, with an opening date of 10 September 1979 (IR, Ex 16). Four applications (yours included), were received; all applicants were female employees of Fort Campbell. A panel of three employees, and a Personnel Staffing Specialist from the Civilian Personnel Office (CPO), Ms. Sarah C. Harper, who served as technical advisor, was appointed to evaluate and rank the candidates. All four applicants were rated highly qualified (HQ), (IR, Ex 18), however, only two candidates were referred to the selecting official, MAJ Wiese, as best qualified (BQ) on the DA Form 2600,

Referral and Selection Register, dated 18 October 1979 (IR, Ex 19). That Referral and Selection Register reflects a handwritten notation "no selection made from this referral list, selection made from referral, dtd 25 Oct 79, for TP NTE 120 days." The record contains another handwritten DA Form 2600, dated 25 October 1979, with the names of the same two candidates referred on the 18 October 1979 referral: Mrs. Sandra J. Berry, Supervisory Budget Analyst, GS-560-9, and Ms. Betty L. McCain, Budget Analyst, GS-560-9. The handwritten referral list, which Ms. Harper attested was prepared after clearing the Stopper list, indicates the selection

of Ms. McCain, based on her experience and ability (IR, Ex 20). MAJ Wiese, in his affidavit, stated that at the time he reported to Force Development Division in August 1979, the position in question was occupied by Ms. McCain, on a temporary basis, and that her appointment was nearing expiration date. Additionally, it was also nearing the end of the budget year, and he was eager to fill the position on a permanent basis. He also stated that since he was aware of the civilian recruitment process and the time required to fill a position, he initiated the recruitment action that resulted in vacancy announcement (IR, Ex 44). At the time he was coordinat-

ing the recruitment action with the CPO, he also expressed some concern as to Mr. Biesel's interest and eligibility. The CPO suggested extending the minimum area of consideration beyond Fort Campbell which would allow for a broader area of competition in view of the activity's affirmative action goals to increase minority representation. However, in extending the area of consideration this also provided an avenue available to then MAJ Beisel (IR, Ex 52).

Mr. Beisel had been assigned to the activity during his military career, and had worked directly with the budget function just prior to his

release from active duty in April 1979. He had been requested and recalled from reserve status to active duty for training in May 1979, to assist in the year-end budget process. On 30 September 1979, he was retired from the reserves. The record evidence reveals that management officials of the activity, specifically MAJ Wiese, COL Crysel, and COL Aguanno expressed interest in hiring Mr. Beisel in a civilian capacity because of his "institutional memory that would benefit the activity and the Army." In this connection, assistance was requested from Mr. Bruce Law, the CPO, who testified that his office provided this assistance (HT, pp. 106

& 107, IR, Ex 53). The record shows that on 25 September 1979, the day after the vacancy announcement for the -position was closed, the CPO forwarded a request for a Certificate of Eligibles (SF-39), to the Office of Personnel Management (OPM), Louisville, Kentucky (IR, Ex 17). The certification, dated 31 October 1979, was returned with the names of five eligibles (all males), including Mr. Beisel, from the Mid Level Announcement. The same evaluation and ranking panel that was used to evaluate the applications received from the vacancy announcement was reconvened on 5 December 1979, to reevaluate the four internal applications in addition to

those received from OPM by certification. The first three certificate eligibles declined for one reason or the other; the two remaining candidates, Messrs. Beisel and William Otte were among the candidates rated BQ, along with the same two local applicants who were previously referred, Ms. McCain and Ms. Berry. The DA Form 2600, dated 5 December 1979, was forwarded to MAJ Wiese who selected Mr. Beisel on 6 December 1979, citing as the basis, his ability, experience and training (IR, Ex 14).

With respect to qualifications, the record is clear that you and the other applicants are substantially equal in

overall qualification for the position as the selectee (IR, Ex 18 & 22). However, I also note that in the summary of qualifications included in the USACARA Investigative Report, pages 7 thru 14, your experience, training and awards are directly related to the position in question, whereas Mr. Beisel's experience reveals that of financial management with related budget functions. Additionally, I note that in the panels' rating process, Mr. Beisel was given credit for his status as honor graduate from the Comptroller course, wherein you had received the same honor in addition to other awards but your status as an honor graduate is not reflected.

Moreover, the only evidence of Mr. Otte's qualifications is his supervisory appraisal, which was less than outstanding, which you did receive. I agree with the Examiner, that while the evidence reflects that the panel made an earnest effort to refer the best qualified applicants, the handling of the referral and selection process appears manipulative at several different points to enhance the chances of a male candidate to your disadvantage. From the onset, the record is clear that responsible officials of the activity were interested in hiring Mr. Beisel, and it was merely a question of his eligibility for consideration after he retired.

Evidence of record reveals that he was permitted to work in the Force Development Division between the period of his retirement and selection to fill the position at issue (ER, p 9 and HT, p 103); widespread rumors that he would get the job was corroborated in testimony and sworn statements of record (HT, pp. 12 & 30, IR, Ex 40, 45 & 48). Additionally, COL Crysel admitted: ". . . Its (sic) just a foregone conclusions that no one else would be that qualified. . . ." He also stated that once there was a shot at getting Beisel, he figured MAJ Wiese would select him any way, so he never had to tell him (IR, p 22, Ex 43). The record further reflects that

management officials also requested an exception to policy to hire Mr. Beisel as a retiree, citing that the expertise required to perform the duties of the position were not available thorugh other employees or other assigned personnel (IR, Ex 55). In view of Ms. McCain extended temporary promotions in the position, and the other three female employees, including you, who initally applied and were found highly qualified for the position, I also agree with the Examiner that the basis for the exception is not supported by the evidence; specifically since the record is devoid of any information that Ms. McCain did not sucessfully perform the duties of

the job during her temporary promotions, and the evidence of record which reflects outstanding performance in Budget Analyst work by you and the other female applicants. You further allege that COL Crysel made a statement to the effect that he would not have a woman in the position. All witnesses that were queried on the issue, except one, Ms. Barbara H. Williams, Budget Accounting Clerk, denied having heard such a statement being made by either COL Crysel or MAJ Wiese (IR, p 17). With respect to the question asked Ms. Berry, Ms. McCain and Ms. Neal as to whether they would raise any objection to Mr. Beisel getting the position, COL Crysel and MAJ

Wiese both admitted that they queried Ms. Mc Cain in this regard because of some concern Mr. Beisel expressed in not wanting to cause any hard feeling among the other applicants (IR, p 19 and Ex 43, 44, 47, 48 & 50). In this connection, I agree with the Investigator's analysis that it appears that management was seeking assurance from Ms. McCain that she would not "rock the boat" in the event they selected Mr. Beisel, and once she, in effect, expressed her approval, then the decision was perfunctory. Based on the foregoing, I am also in agreement with the Examiner that it is obvious from the record evidence that the selection process was tainted with manipulations

to insure Mr. Beisel's consideration and, once he was referred, there was no doubt of his selection by MAJ Wiese To that extent, and the extreme actions taken by responsible management officials on behalf of a particular male candidate when there were qualified females, I find that a preponderance of the evidence supports the conclusion that though management's reasons for its selection action for the position at issue are legitimate, and nondiscriminatory on the surface, they were, in fact, a pretext for discrimination in the recruitment and referral process. Specifically in view of MAJ Wiese's expressed eagerness to fill the position as quickly

as possible on a permanent basis, and the number of highly qualified female candidates which resulted from the Merit Promotion Vacancy Announcement.

I also note that in the initial competition for the position, although you were rated HQ among the four female contenders, you were not referred as BQ to the selecting official as were two of the other female applicants. You contend that you were told by Ms. Sara Harper in early November 1979, after the first panel evaluation, that a request had been made that only two names be forwarded for consideration, this was repeatedly denied by Ms. Harper, COL Crysel and MAJ Wiese.

In this regard, I note that the activity's Merit Promotion Plan, CAM Reg 690-1, provides that normally three to five of the BQ candidates will be referred to the selecting official, and up to 10 candidates may be certified if meaningful distinctions cannot be made among a smaller number. The regulation also stipulates in pertinent part that ". . . the minimum area of consideration for each position will be determined so that it will be expected to include a sufficient supply of eligible employees to produce enough highly qualified candidates (generally, at least three); provide attractive career op-

portunities for employees and assure that they are not restricted to dead-end jobs; make the most effective use of employees . . . ." I find that the record evidence in this action is inconsistent with the aforecited policy, and reflects arbitrary and capricious decisions in the recruitment process which resulted in numerous procedural errors and deficiencies in the evaluation and referral of candidates, particularly the assessment of other job related factors in combination with quality of experience, i.e., self-development, awards, and supervisory appraisals. In summary, the evidence shows that your overall qualifications were essentially equal to those of the

selectee and the other referred candidates.

I am therefore persuaded by the evidence of record and my analysis to conclude that you were discriminated against in the merit promotion process when you were not given proper consideration for your qualifications, in favor of a male candidate. However, despite the improper consideration, I find that the record shows sufficient, clear and convincing evidence that you would not have been selected for the position at issue even had you been referred for consideration. Accordingly, I am hereby modifying the Examiner's recommendations, and direct-

ing that you be afforded priority consideration consistent with the provisions of 29 CFR 1613.271(b)(2). I am also directing that responsible officials of Headquarters 101st Airborne Divison Fort Campbell, Kentucky insure that the matters which led to and resulted in your instant complaint do not recur by strict compliance with established regulatory policy and procedures of OPM and the Department on Merit Promotion and Equal Employment Opportunity.

This constitutes the final decision on the merits of your complaint. For purposes of your appeal rights, a final Agency decision will be issued

when the amount of attorney fees has been decided in accordance with the procedure set forth below. At that time you will be advised of your appeal rights on all the issues of your complaint including attorney fees. This is in accord with EEOC regulations 29 CFR 1613.281 which provide that you may not appeal any issues in your complaint until the issue of the amount of attorney fees has been decided by the agency.

Inasmuch as I have rendered a finding of discrimination, you are entitled to reimbursement for reasonable attorney fees and costs that you may have incurred in pursuing your complaint.

Reimbursement may be made only for the services of members of the Bar, and law clerks, paralegals, or law students under the supervision of members of the Bar, and only for services performed after your formal complaint was filed and after you notified the Department of the Army that you were represented by an attorney. As an exception to the foregoing, reimbursement may be made for expenses incurred during a reasonable period of time prior to notification of representation for any services performed by an attorney in reaching a determination to represent you. No attorney fees are payable for the services of persons who are federal employees. You

may be reimbursed for those actual costs incurred which are authorized by 28 U.S.C. 1920, to include fees for printing, witnesses, exemplification, and copies of papers necessarily obtained for use in the case. No witness fees shall be paid for a federal employee who is in a duty status when made available as a witness.

If you intend to claim attorney fees or costs, your attorney must submit a verified statement of costs and attorney fees, accompanied by an affidavit executed by the attorney of record, itemizing the attorney's charges for legal services. The statement and affidavit must be sub-

mitted to the Equal Employment Opportunity Officer at Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, ATTN: AFZB-EEO, Fort Campbell, KY 42223, within 20 calendar days of the receipt of this letter and must include the information described in Inclosure 3. Within 30 calendar days of the receipt of the verified statement and affidavit, I will render a final Agency decision determining the amount of attorney fees or costs to be paid. The decision will include the specific reasons for determining the amount of the award and your appeal rights on all issues.

The docket number identified in the upper right hand corner of page 1, has been assigned to the case. Request that this number be used on all correspondence to this Office concerning this case.

Sincerely,

3 Incl
as

Marion A. Bowden
Director of Equal Employment Opportunity

No. 86-1626

In the Supreme Court of the United States

OCTOBER TERM, 1986

JANIE L. HASKINS, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court's determination that the Department of the Army had discriminated against petitioner on account of her sex did not include a finding that the Army would have promoted petitioner in the absence of discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 808 F.2d 192. The opinions of the district court (Pet. App. 18a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1979, petitioner, a civilian employee with the United States Army at Fort Campbell, Kentucky, and three other women applied for a GS-11 position as Supervisory Budget Analyst (Pet. App. 2a). The Army selection panel ranked petitioner as "Highly Qualified" for the position, and ranked two of the other female applicants as "Best Qualified." The panel did not forward

petitioner's application for further consideration because only applicants ranked as Best Qualified were to be considered in the final selection process (*ibid.*).

The Army subsequently publicized more broadly the position to expand the applicant pool (Pet. App. 2a). Following that additional publicity, the selection panel reviewed all submitted applications, which included the original four female applicants and two new applicants, both of whom were male. The panel, as before, ranked the same two women Best Qualified, and it also ranked the two men Best Qualified (*ibid.*). Petitioner was again ranked only Highly Qualified, and her name was not forwarded for further consideration (*ibid.*). The Army selected one of the male applicants for the position (*ibid.*).

2. In February 1980, petitioner filed an administrative complaint with the Fort Campbell Equal Employment Opportunity Commission, in which she alleged that she had been denied the promotion on account of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 3a). The United States Army Civilian Appellate Review Agency (USACARA) investigated the complaint and, based on its recommendation, the Army proposed a finding of no discrimination (*id.* at 3a).

At petitioner's request, an EEOC complaint examiner conducted a hearing on petitioner's complaint. The examiner applied the burden shifting approach articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and found that the Army had discriminated against petitioner on the basis of her sex by preselecting a man for the job (Pet. App. 3a). Relying on *Day* v. *Mathews*, 530 F.2d 1083 (D.C. Cir. 1976), the examiner concluded (Pet. App. 4a), however, that petitioner was not entitled to a hiring order or back pay because the Army had shown by clear

and convincing evidence that she would not have been selected to fill the GS-11 position even absent the impermissible discrimination.

Both the USACARA's recommendation and the complaint examiner's findings were forwarded to the Office of the Assistant Secretary of the Army, which agreed with the examiner's findings but concluded that petitioner was entitled to an award of priority promotion and attorney's fees (Pet. App. 4a, 54a-84a). The Army further ordered the responsible officials at Fort Campbell to "insure that the matters which led to and resulted in [petitioner's] complaint do not recur by strict compliance with established regulatory policy and procedures of [the Office of Personnel Management] and the Department [of] Merit Promotion and Equal Employment Opportunity" (*id.* at 79a). On petitioner's appeal to EEOC's Office of Review and Appeal, the EEOC affirmed on the ground that petitioner would not have been selected even absent discrimination (*id.* at 4a).

3. Petitioner filed an employment discrimination complaint against the Army in the United States District Court for the Middle District of Tennessee in which she alleged that she had been the victim of unlawful sex discrimination, in violation of Section 703(a)(1) of Title VII, 42 U.S.C. 2000e-2(a)(1) (see 42 U.S.C. 2000e-16(d)), and in which she sought, inter alia, retroactive promotion, back pay, and attorney's fees and costs pursuant to Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g) (Pet. App. 5a). The Army filed a motion for summary judgment in which it acknowledged that it had discriminated against petitioner on account of sex, but contended that summary judgment should nonetheless be granted in its favor because, as the EEOC had found, petitioner would not have been hired in the absence of discrimination (*ibid.*). Petitioner moved for partial summary judgment on the

issue of Title VII liability and opposed the Army's motion for summary judgment. The district court granted petitioner's motion and denied the Army's motion (*id.* at 5a, 52a-53a). After holding a trial on the issue of relief, however, the court concluded that the Army had "clearly and convincingly proved that, absent discrimination by it, [petitioner] nevertheless would not have been selected to fill the [GS-11 position]" (*id.* at 50a). The court accordingly denied petitioner's requested relief.[1]

4. The court of appeals affirmed (Pet. App. 1a-17a). The court agreed (*id.* at 13a-14a) with the district court that petitioner was not entitled to relief because "the Army had established by clear and convincing evidence that [petitioner] would not have been promoted even in the absence of discrimination." The court of appeals rejected petitioner's contention that the court's intervening decision in *Blalock* v. *Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985)—which held that the causation inquiry should be made in determining liability, and not relief—required a different result. According to the court of appeals (Pet. App. 12a-13a), because the EEOC, Army, and district court had clearly assumed, prior to *Blalock*, that the causation inquiry was relevant to relief, and not to the threshold liability issue, *Blalock* should not be read as retroactively extending the EEOC's earlier determination of liability—admitted by the Army and adopted by the district court—to include a determination (and Army admission) that petitioner *would* have been promoted absent sex discrimination. The court of appeals stressed (Pet. App. 13a) the "unique posture" of this case, and that "[a] district court's findings, as with a party's admissions, must be analyzed in the setting they were made."

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[1] On December 9, 1985, the district court denied petitioner's motion to alter or amend its judgment and for an award of attorney's fees (Pet. App. 18a-25a).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court, and does not present a conflict with any decision of any other court of appeals that warrants this Court's review.

1. The court of appeals correctly upheld the district court's denial of petitioner's request for retroactive promotion and back pay under Title VII. Because Congress intended economic relief under Title VII to be measured by the extent of the actual economic injury, a court must deny retroactive promotion and back pay where such relief would exceed the actual injury. See *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-429 & n.4 (1975). For this reason, a Title VII plaintiff is not entitled to such retroactive relief unless the alleged discriminatory act caused his asserted injury. Where the employee would not have been promoted even in the absence of discrimination, the necessary causal link is missing. Cf. *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 285 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977).

The district court in this case found that the Army had established by clear and convincing evidence that, regardless of any sex discrimination, petitioner would not have been promoted (Pet. App. 4a, 27a, 50a). Petitioner does not seriously claim that this factual finding is clearly erroneous,[2] but argues that the finding should nonetheless be ignored because it is contradicted by the district court's

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[2] Petitioner's suggestion (Pet. 28, 31) that the Army's preselection of a man for the GS-11 position "tainted" the entire process must be rejected. The district court found that "improper procedures were not employed in selecting the [four Best Qualified] applicants" (Pet. App. 50a), and the court of appeals expressly affirmed that factual finding (*id.* at 13a-14a).

determination that the Army is liable under Title VII. The court of appeals properly rejected petitioner's argument because no such contradiction exists.

Contrary to petitioner's assumption, the district court's determination of liability did not include a finding that the Army would have promoted petitioner in the absence of discrimination. As the court of appeals found (Pet. App. 13a), "there is absolutely no doubt that the * * * causation standard was not applied" by the district court in determining liability. Petitioner's challenge to the decision of the court of appeals therefore rests on an erroneous premise, and the court's denial of petitioner's requested relief was correct.

2. For similar reasons, petitioner's claim that the decision of the court of appeals conflicts with decisions of this Court and with decisions of other courts of appeals lacks merit.

a. Petitioner contends (Pet. 20-32) that this case presents a conflict in the circuits concerning whether the causation inquiry should be made during the liability stage, the relief stage, or during both stages, of an individual employment discrimination claim. Compare *Blalock* v. *Metals Trades, Inc.*, 775 F.2d at 709-712 (liability) and *Dillon* v. *Coles*, 746 F.2d 999, 1004-1005 (3d Cir. 1984) (same) with *Day* v. *Mathews*, 530 F.2d 1083 (D.C. Cir. 1976) (relief) and *Bibbs* v. *Block*, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (same). Any conflict in the circuits on that issue is not presented by this case, however, for two independent reasons.

First, the timing of the causation inquiry did not affect the proper disposition of petitioner's request for relief. Petitioner is not entitled to retroactive promotion and back pay as long as a causation inquiry is appropriate at either the liability or the relief stage. All the circuits agree

that it is appropriate at some stage and therefore petitioner would not be entitled to relief under the view of any circuit.

Second, the Sixth Circuit agrees with petitioner that the causation inquiry should occur only during the liability phase. See *Blalock* v. *Metals Trades, Inc., supra.* The Sixth Circuit ruled against petitioner in this case only because it rejected petitioner's contention that the EEOC's and district court's pre-*Blalock* determinations of Title VII liability embodied a finding that the wrongful action had caused injury to petitioner. The court of appeals instead deferred (Pet. App. 12a) to the unambiguous intent of the EEOC, Army, and district court to treat the causation issue separately. The court stressed (*id.* at 13a), however, that its ruling was based on the "unique posture" of the case—that the EEOC, Army, and district court had made their respective liability determinations prior to the court of appeals' decision in *Blalock*.

Hence, rather than present a conflict in the circuits on the proper timing of the causation issue, the case presents at most only the transitional issue whether the rule subsequently announced by the court of appeals in *Blalock* should retroactively dictate the scope of the prior determinations of liability. In our view, the court of appeals correctly rejected petitioner's view, which "would [have] require[d] * * * [the court of appeals] to ignore the established facts and to eliminate the question of causation from the Title VII analysis [in this case]" (Pet. App. 16a).[3] The court of appeals' decision, moreover, certainly

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[3] Petitioner is in any event hardly in a position to complain that the EEOC and district court failed to consider causation during the liability stage. Had the EEOC done so, presumably it would have concluded that the Army was not liable at all. The Army accordingly would not have awarded petitioner the relief it did in this case, which included priority promotion consideration, attorney's fees and costs for the administrative proceeding, and an injunction (see Pet. App. 79a-80a).

does not conflict with any decision of any other court of appeals. No other court of appeals has adopted petitioner's theory and, like the court of appeals (*ibid.*), "we [cannot] imagine that any other court would do so."[4]

b. Petitioner also asserts (Pet. 37-40) that the court of appeals' decision conflicts with the Fourth Circuit's decision in *Pecker* v. *Heckler*, 801 F.2d 709 (1986). According to petitioner (Pet. 38-39), the Fourth Circuit in *Pecker* "held that a federal employee who has been found to be an actual victim of discrimination at the administrative level is entitled to sue in federal court for effective relief without a further causal analysis." Petitioner's depiction of the holding in *Pecker*, however, fails to account for a critical factual distinction between that case and the instant case. In *Pecker*, a Title VII plaintiff sought enforcement and additional relief pursuant to an EEOC decision holding that the employee *would* have been promoted in the absence of discriminatory conduct (see 801 F.2d at 711 n.4). Because the district court was required to adopt the administrative findings that were favorable to the plaintiff, including the EEOC's causation analysis, the plaintiff in *Pecker* entered the district court having already established an entitlement to retroactive promotion and back pay. In the instant case, in contrast, the EEOC ruled that petitioner would *not* have been promoted even in the

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[4] Petitioner also contends (Pet. 30-31 & nn. 30-32) that review is appropriate because the courts of appeals currently disagree as to whether an employer must demonstrate the absence of causation by clear and convincing evidence or by a preponderance of the evidence. To the extent that such a conflict may exist, however, this case does not provide an appropriate vehicle for its review. Petitioner had the benefit of the clear and convincing evidence standard (see Pet. App. 13a-14a, 42a, 78a), which is the standard more favorable to the plaintiff, and the lower courts determined that the Army had met that exacting standard in this case.

absence of discrimination (Pet. App. 16a).[5] The district court here, unlike the court in *Pecker*, was therefore unable to adopt an administrative causation analysis that was favorable to petitioner, because the EEOC's causation inquiry resulted in a finding that was adverse to petitioner. Accordingly, the court, "in accordance with [petitioner's] wishes" (Pet. App. 15a), limited its de novo factual review to a determination of whether petitioner would have been promoted in the absence of discrimination. Thus, as the Sixth Circuit observed (*id.* at 16a), the distinction between *Pecker* and the instant case is "obvious" and the decisions of the Sixth Circuit in this case and the Fourth Circuit in *Pecker* are entirely consistent.

3. Petitioner contends (Pet. 32-35) that this case raises "questions of exceptional importance concerning the role of causation" in Title VII cases. No important issue is presented by the petition. The timing of the causation inquiry is, as described above, not relevant to the proper disposition of the petition and, as petitioner acknowledges (Pet. 33-35), no circuit currently holds the view that a causation inquiry is inapplicable to a Title VII employment discrimination claim. Finally, petitioner's suggestion (Pet. 35-36) that review is warranted because the courts of appeals have largely "failed to recognize the critical distinction between individual and class action employment discrimination cases this Court identified in *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867 (1985)," is unavailing. No one disputes that the focus of the causation inquiry might differ in the two contexts, and petitioner nowhere suggests how the absence of any explicit recognition of this "critical" distinction led the court of appeals to an erroneous result in this case.

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[5] For the reasons previously described, the EEOC's pre-*Blalock* determination of the Army's Title VII liability did not include a finding favorable to petitioner on the causation issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483:40401